Supreme Court, U.S.
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No. 97-1332

In The

Supreme Court of the United States

October Term, 1997

SARAH YEAROUS, TONYA CRISMAN, JONELL ROBINSON, and CHINTAMANI FRAHM,

Petitioners,

v.

NIOBRARA COUNTY MEMORIAL HOSPITAL, By and Through its Board of Trustees,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Petitioners' disagreement with the Tenth Circuit's characterization of the record warrant discretionary review by the United States Supreme Court?

2. Does Petitioners' claim of a conflict between the Circuits as to the elements of constructive discharge present an issue warranting review?

3. Can Petitioners raise an issue for discretionary review in this Court when they have failed to raise that issue at any time below?

STATEMENT AS TO PARTIES

Pursuant to Supreme Court Rule 29.6, all parties are set forth in the caption. Respondent's correct name is Niobrara County Hospital District. It is a governmental entity organized pursuant to Wyo. Stat. § 35-2-401 et seq. There are no parent or nonwholly owned subsidiaries of this governmental entity.

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Supreme Court Rule 10 9

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Niobrara County Hospital District (Hospital) respectfully prays that this Court deny the request of Petitioners to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on October 21, 1997.

I. INTRODUCTION

This case involves claims of constructive discharge arising under 42 U.S.C. § 1983 and State contract law. Petitioners obtained a jury verdict against Respondent on both theories, and the District Court entered judgment on the verdict in their favor. The Tenth Circuit reversed, holding that there was insufficient evidence to sustain the verdict as a matter of law and that the Petitioners voluntarily resigned rather than being constructively discharged from their employment at Respondent hospital.

Petitioners claim that the Tenth Circuit erred in three general respects. They claim that the Tenth Circuit erroneously found that there was no legally sufficient evidentiary basis for the jury's verdict when viewing the record in the light most favorable to them. Petitioners also claim that there is a conflict between the Circuits as to the definition of constructive discharge. Finally, they claim for the first time in their petition that there is a distinction between the definition of constructive discharge under a State law contract claim and a Federal civil rights claim based on a claimed deprivation of a property interest without due process.

II. PETITIONERS MISSTATE THE RECORD BELOW

Petitioners set forth their perception of the facts of this litigation rather than the facts of record. The relevant facts are set forth in the Tenth Circuit's opinion. (see Petition Appendix A pp. A-3 through A-10). The issue in this case is whether Petitioners were constructively discharged from their employment as nurses at Respondent Hospital. Petitioners voluntarily submitted their resignations on August 9, 1995. Their voluntary resignation relinquished any property interests they may have had in continued employment and they were therefore as a matter of law not deprived of a property interest without due process of law. For the same reason, the record did not support a claim for breach of an implied contract by constructive discharge.

Petitioners argue that this case involves an attempt to defraud Medicare, and therefore a brief summary of the facts which relate to Petitioners' fanciful assertion is warranted. The Hospital is a small rural health care facility located in Lusk, Wyoming. The facility includes a ten bed hospital and a thirty-six bed nursing home. A Director of Nursing supervises the nursing staff of the facility.

In the Spring of 1995, the director of nursing position became vacant. After conducting a search to fill the position, the Hospital hired the only remaining candidate, Vickie Winney. Winney started her new position on July 10, 1995.

On July 12, 1995, Patient A was transferred from the Wyoming Medical Center located in Casper, Wyoming. The patient was improperly admitted to the Lusk nursing home without a doctor's order. The patient was then

transferred to a "swing" bed[1] in the hospital portion of the facility by a staff doctor. Winney and Petitioner Robinson disagreed over how to document the transfer of the patient from the nursing home to the hospital. Winney felt that because the patient was improperly admitted to the nursing home, the documentation should reflect the patient was transferred directly from Casper to the hospital "swing" bed. Robinson insisted on charting the patient as coming to the hospital from the nursing home. Although Robinson felt that she was being asked to falsify medical records, Winney allowed her to complete the documents as she deemed proper without taking any adverse action against her.

On July 25, 1995, Patient C was admitted as an acute care patient in the hospital. On July 27, 1995, Patient C was transferred by his attending physician to swing bed status. Part of Winney's duties included non-medical utilization review for compliance with Medicare classifications and qualifications. In order to qualify for swing bed Medicare classification, a patient had to have three prior nights of acute care. Winney recognized that Patient C did not qualify for swing bed classification because he had not spent the requisite three prior nights in acute care. Petitioners Robinson and Frahm contend that the director suggested that Patient C's records be changed to

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[1] "Swing" bed is a Medicare designation permitting less physician involvement in the patient's care than an "acute" bed and more than nursing home care. Certain requirements must be met in order to obtain qualification for Medicare reimbursement of "swing" bed care. "Swing" bed care is provided in the hospital rather than the nursing home.

qualify him for Medicare. Robinson testified at trial as follows:

> Q. And then your testimony is she said, "All we have to do is change these dates," correct?
>
> A. Correct.
>
> Q. And Chin Frahm immediately said, "I'm not changing anything," or words to that effect, right?
>
> A. That's correct.
>
> Q. And Ms. Winney immediately replied, "No, no, no. I'm not asking you to change anything"; isn't that true?
>
> A. That wasn't my interpretation of what she said.
>
> Q. Well, I'm not talking about interpreting what she said. I'm talking about the words she spoke. She said, "No, no, no. I'm not asking you to change anything," didn't she?
>
> A. She said, "No, no, no. I'm not asking you to change anything."

Aplt. App. Vol. II at 452. In the end, Patient C's records remained unaltered, he failed to qualify for Medicare, and no adverse personnel action was taken against any of the Petitioners relating to the incident. Petitioners' allegations of a plan to commit Medicare fraud is without support in the record.

Assertions that the Petitioners were fearful for their licenses and might potentially have faced criminal charges are also subjective interpretations of the facts, and are not supported by the record. There is no evidence

which indicates that any action which jeopardized Petitioners' licenses or threatened them with criminal prosecution was ever taken.

Petitioners also allege that Winney lied to state inspectors concerning staffing. Petitioners take liberties with the record on this point. They submitted their resignations on August 9, 1995. The next day, although finding no wrongdoing by Winney, the Hospital administrator discharged her in order to appease the Petitioners, who had actually controlled the nursing service at this small hospital for some time. After meeting with Winney and the administrator and learning that no wrongdoing had been found, the Hospital Board directed the administrator to reinstate Winney. On Friday, August 11, 1995, Winney was told that she was reinstated in her position and to return to work on Monday, August 14, 1995.

That same Monday a state survey team came to inspect the facility. They identified staffing problems which had occurred over the weekend between Winney's reinstatement and return to work, a period that she was not working. Winney believed that a nursing assistant was scheduled to work over that weekend and so advised the state inspection team. She was mistaken and later acknowledged such. A mistaken belief about scheduling during the time when Winney had just been discharged and then reinstated is far from an overt lie to the state survey team as claimed by Petitioners.

More importantly, this incident occurred after the Petitioners submitted their resignations. Petitioners cannot bootstrap a claim for constructive discharge on events occurring after their resignations.

Petitioners assert that "[b]oth of the Respondent's expert witnesses and a hospital board member admitted on the stand that if the facts as alleged by Petitioners were true, the Petitioners had no choice but to resign." Petition p. 7. These witnesses were not called by the Hospital to establish whether the Petitioners should have resigned or not. Neither of the two witnesses alleged by the Petitioners to be experts were ever asked by either party to opine as to whether or not Petitioners were forced to resign. Rather they were called by the Hospital to testify factually about certain conversations and consultations they had with Winney. In response to a hypothetical cross-examination question unsupported by the record, one testified that falsifying a date on a chart is illegal and unethical, and that to even suggest changing dates on a chart is a "serious shortfall." The other testified that it would be forbidden to backdate medical records to qualify a patient for Medicare, and that if a person did that, she might wind up in the state women's prison. Nowhere in the record is there any evidence establishing that any medical records were falsified or improperly changed.

During the first month that Winney was employed as the Director of Nursing, the administrator took a three week vacation. Upon his return on Monday, August 8, 1995, three of the Petitioners (Frahm, Robinson, and Crisman) submitted complaints relating to the new director. Yearous did not submit a complaint to the administrator. The administrator spoke individually with the three Petitioners who submitted complaints and informed them that he would look into their complaints. Despite his assurances, the Petitioners submitted their resignations the next day, August 9, 1995.

After Winney's discharge and reinstatement, which occurred during that work week, the Board instructed the administrator to ask the Petitioners to rescind their resignations, remain at the Hospital and try to resolve their differences with Winney. The administrator then made persistent pleas to the Petitioners to reconsider their resignations, which they ignored.

The Petitioners requested an informal hearing before less than the entire Board after they submitted their resignations. The Board offered them a formal hearing before the entire Board at its next regularly scheduled meeting. The Petitioners did not accept the offer and no hearing was therefore conducted.

A more detailed statement of facts is set forth in the Tenth Circuit's opinion. (Petition Appendix A, pp. A-3 through A-10).

III. THE TENTH CIRCUIT CORRECTLY DETERMINED THE FACTS IN THE LIGHT MOST FAVORABLE TO PETITIONERS AND APPLIED THE CORRECT RULE OF LAW.

Petitioners argue that the Tenth Circuit incorrectly applied a subjective standard of review when reviewing the jury verdict in this matter. They assert that the Tenth Circuit erroneously determined the facts of record when it held there was insufficient evidence to support the verdict.

The record shows that the Tenth Circuit set forth and applied the correct standard of review in its opinion. It stated that "[t]he standards governing our review are

well established. We will reverse the denial of a Rule 50 motion only if the evidence points but one way and is susceptible to no reasonable inferences supporting the nonmoving party. *Haines v. Fisher,* 82 F.3d 1503, 1510 (10th Cir. 1996). 'We do not weigh the evidence, pass on the credibility of witnesses, or substitute our conclusions for that of the jury. However, we must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis with respect to a claim . . . under the controlling law.' *Mason v. Oklahoma Turnpike Authority,* 115 F.3d 1442, 1450 (10th Cir. 1997) (internal quotations and ellipses omitted)." (Tenth Circuit's opinion; Petition Appendix A, p. A-3).

The Tenth Circuit properly recognized that an employee's constructive discharge from a position in which an employee has a protected property interest may be actionable under 42 U.S.C. § 1983 citing *Bailey v. Kirk,* 777 F.2d 567, 579 (10th Cir. 1985). (Petition Appendix A, p. A-10). The central focus of the Tenth Circuit's analysis was on the voluntariness of Petitioners' resignations. The Court considered the totality of the circumstances under an objective standard, a correct application of the law under *Parker v. Board of Regents of Tulsa Jr. College,* 981 F.2d 1159, 1161-62 (10th Cir. 1992); *Hargray v. City of Hallandale,* 57 F.3d 1560, 1570 (11th Cir. 1995); *Maez v. Mountain States Telephone and Telegraph, Inc.,* 54 F.3d 1488, 1502 (10th Cir. 1995); *Lenz v. Dewey,* 64 F.3d 547, 552 (10th Cir. 1995); *Cacy v. City of Chickasha,* 124 F.3d 216 (10th Cir. 1997) (unpublished).

Petitioners have a misconception of the actual record and make factual assertions inconsistent with it. A review of the record demonstrates beyond any doubt that the

Tenth Circuit properly reviewed the record and considered the facts to be found there in the light most favorable to the Petitioners.

The Tenth Circuit then applied the correct rule of law in determining whether that evidence could support a constructive discharge claim, or showed that Petitioners voluntarily resigned. The resources of the United States Supreme Court should not be expended on a dispute over whether the record shows the facts to be as the disgruntled Petitioners claim or as the Tenth Circuit held when applying the appropriate standard of review. Supreme Court Rule 10.

IV. THE TENTH CIRCUIT WAS CORRECT IN REVERSING RATHER THAN REMANDING FOR A NEW TRIAL WHEN THERE WAS A LEGALLY INSUFFICIENT EVIDENTIARY BASIS FOR A CLAIM OF CONSTRUCTIVE DISCHARGE.

The Petitioners argue that because the jury was not instructed on the factors relating to voluntariness of the resignation as set forth in *Lenz, supra* and *Parker, supra,* the case should have been remanded for a new trial rather than reversed. They miss the point of the Tenth Circuit's ruling – the undisputed facts demonstrate that as a matter of law their resignations were voluntary, and that as a matter of law they were not constructively discharged. There was never a case to submit to a jury, and remand for trial on evidence which was insufficient as a matter of law to submit to a jury would have been senseless, futile, and contradictory.

Moreover, Petitioners misstate the record relating to the instruction conference, for whatever importance it has. Instruction No. 18, relating to the issue of voluntary resignation, was not tendered by either party, but was developed by the trial court. Aplt. App. 1390. It originally contained the list of four factors set forth in *Lenz, supra.* and *Parker, supra.* Respondent had no objection to the instruction as originally proposed by the Court. Aplt. App. 1384. However, Petitioners objected arguing that the factors didn't apply to this kind of case. Aplt. App. 1387. The trial court decided to give the instruction as requested by Plaintiffs, deleting the four factors.

Counsel for Respondent stated at the appropriate time that the instruction properly reflected the law and it should have been given. Without the four factors, the instruction was meaningless. Petitioners refer to an isolated comment by Respondent's counsel that he understood the language to be contentious. This statement was no more than an acknowledgment that there was disagreement between the parties. It certainly cannot provide a basis for argument that Respondent did not believe the jury should be instructed to consider the *Lenz* factors or that the instruction was not a correct statement of the law. Respondents clearly argued that the factors were a correct statement of the law and objected to the trial court's refusal to give that instruction.

More importantly, the fact that the jury might have been improperly instructed in a manner which prejudiced Respondent and benefitted Petitioners did not preclude the Tenth Circuit from reversing rather than remanding when its review of the record in light most favorable to the Petitioners reveals no legally sufficient evidentiary

basis for a claim under controlling law – there was nothing for a jury to determine. *Mason v. Oklahoma Turnpike Authority,* 115 F.3d 1442, 1450 (10th Cir. 1997). There was no point in remanding the case for a new trial on legally insufficient evidence no matter what the correct instruction might have been if there was not a case to submit to a jury.

V. PETITIONERS ARGUE A CONFLICT BETWEEN THE CIRCUITS WHICH MAY OR MAY NOT EXIST. IN EITHER CASE, THE TENTH CIRCUIT APPLIED THE STANDARD LESS ONEROUS TO PETITIONERS AND STILL FOUND INSUFFICIENT EVIDENCE TO SUPPORT THEIR CLAIMS. REVIEW COULD NOT YIELD PETITIONERS ANY RELIEF.

Petitioners argue "that the contours of the constructive discharge doctrine is an important question of federal law", and that there is a dispute between the decisions of the Fifth Circuit (including *Fowler v. Carrollton Public Library,* 799 F.2d 976, 979 (5th Cir. 1986)) and those of the Tenth Circuit (including *Spulak v. Kmart Corp.,* 894 F.2d 1150, 1154 (10th Cir. 1990)).

In the appeal to the Tenth Circuit, the parties disagreed as to whether the constructive discharge standard applied in Title VII sexual harassment cases should be utilized in 42 U.S.C. § 1983 due process claims. There are distinctions between the Fifth Circuit's analysis of constructive discharge under 42 U.S.C. § 1983 on the one hand, and the Tenth Circuit's analysis of constructive discharge under Title VII and the ADEA on the other. Respondent argued at length that the Tenth Circuit

should follow the Fifth Circuit when a constructive discharge is claimed to be a deprivation of property without due process of law under 42 U.S.C. § 1983.

Under the Fifth Circuit's approach, there must be a nexus between the conduct complained of and the constitutional right asserted. Constructive discharge in a procedural due process case constitutes a § 1983 claim only if it amounts to a forced discharge to avoid affording an employee the pretermination due process procedures described in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). *Fowler v. Carrollton Public Library*, 799 F.2d 976, 980-981 (5th Cir. 1986). Under this standard, there must be evidence of a purposeful effort to cause an employee to resign to avoid providing him his procedural due process rights.

As to a claim for constructive discharge based on Title VII and the ADEA, the Tenth Circuit has held that such a claim arises when an employer deliberately makes or permits an employee's working conditions to become so intolerable that a reasonable person would have no choice but to resign, and the employee does in fact resign. *Spulak v. Kmart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990). An employer is only responsible for intending those consequences that can reasonably be foreseen as the result of its actions. *Id.* at 1154. Hence, an objective standard is applied in the Tenth Circuit in constructive discharge claims based on Title VII and ADEA. That standard works well in a sexual harassment case – an employer who tolerates sexual harassment in the workplace should reasonably expect the harassed employee to quit, even if he has no intent to force the employee to do so.

Respondent believes that comparing the elements of constructive discharge for those two different types of claims is like comparing apples to oranges – the standard is probably different because of the nature of the claims, not because of a conflict between the Circuits. Whatever the merits of that argument, Tenth Circuit did not address these distinctions and simply applied the reasonable person objective standard it uses in Title VII and ADEA claims, the standard argued for by Petitioners. Petitioners are not in a position to raise the distinctions argued below as basis for granting review when the standard which they argued for was in fact applied by the Tenth Circuit.

The Tenth Circuit agreed with Petitioners as to the law of constructive discharge – it just found that as a matter of law they had failed to produce evidence sufficient to prove the elements for which they argued. This was the less onerous of the two standards. If this Court reviewed the case, it could hold that the Tenth Circuit applied the correct standard, or that it should have applied the more stringent test of the Fifth Circuit. If Plaintiffs could not meet the lesser standard, they certainly couldn't meet the greater. Therefore, no meaningful relief could come to them from review.

VI. FOR THE FIRST TIME, PETITIONERS ARGUE A DISTINCTION BETWEEN THE ELEMENTS OF CONSTRUCTIVE DISCHARGE UNDER FEDERAL LAW AND STATE CONTRACT LAW. THIS ARGUMENT IS UNTIMELY AND WAS WAIVED.

Petitioners argue that the Tenth Circuit improperly applied Federal principles of constructive discharge to Petitioners' State law claim for breach of contract. This argument is contrary to the positions taken by the Petitioners below. Petitioners argued to the Tenth Circuit:

> The district court also properly instructed the nurses' contract claim (Instruction 23, Aplt. App., Vol. 1, N.28, p. 268), setting forth the elements of the contract claims as well as the elements of constructive discharge in a contract setting. This instruction, which was not objected to by Hospital, did not contain a requirement of any intent on the part of the employer. Rather, it merely stated that, with respect to the constructive discharge, appellees had to prove: "That a reasonable person would have viewed the working conditions at the hospital as so intolerable that the employee plaintiff would have no other choice but to quit."

(Petitioners' Response Brief to Tenth Circuit Court of Appeals, pp. 21-22). The jury was instructed that in order for the Petitioners to recover on *any* of their claims, they each must prove they were constructively discharged. Instruction 15, Aplt. App. 261. They were thus told that the definition of constructive discharge was the same for the State and Federal claims. It is much too late to raise this issue now by a petition for certiorari. *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850, 852 (1955).

Petitioners got the instructions they wanted in the trial court. Instruction 23 defined the elements of breach of contract by constructive discharge as including a requirement that "a reasonable person would have viewed the working conditions at the hospital as so intolerable that the employee plaintiff would have no other choice but to quit". Aplt. App. 268. This is precisely the standard that the Tenth Circuit applied in its opinion. Petitioners did not object to either of these instructions at trial, nor did they raise any issue concerning them on appeal – indeed, they argued that this was a correct instruction over Respondent's argument that they had to prove an intent to cause them to resign. The issue cannot be raised now.

Petitioners also argue that "the Hospital had a clear and unambiguous policy which required the administrator to set up a hearing with the board of directors if an employee wished to address the board." (Petition pp. 9-10). They contend that there was evidence at trial indicating that the nurses had asked for a hearing with the board on several occasions. Therefore, they argue, there was evidence of a breach of contract because Petitioners did not receive a hearing.

Petitioners misstate the record on this point. The Petitioners were offered a formal hearing before the entire Board. Petitioners wanted an informal hearing instead and declined to participate in the formal hearing offered. The Board was not obligated to tailor the hearing to the whims of the Petitioners.

More importantly, the jury was never asked to decide whether Petitioners' implied contracts of employment

were breached in some way other than by constructive discharge. Petitioners offered no instructions in this regard and did not object to those instructions given which directed the jury to consider only the constructive discharge claim as a possible breach of contract. The verdict form, to which Petitioners likewise did not object, asked the jury to decide only whether their implied contracts had been breached by constructive discharge. Once again, Petitioners cannot raise this issue for the first time on a petition for certiorari. *Ellis v. Dixon, supra.*

VII. CONCLUSION

Petitioners base their request for review on an erroneous view of the facts of record. They also claim a purported and perhaps nonexistent conflict between the circuits which was not even material to the Tenth Circuit's resolution of the case. Finally, they argue a putative distinction between State and Federal standards defining constructive discharge, making an argument contrary to the position they took below. Petitioners identify no issue worthy of this Court's exercise of its discretionary jurisdiction, and the petition should be denied.

Dated this 12th day of March, 1998.

Respectfully submitted,

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